Supreme Court, U.S.
FILED

No. _____

09-424 JUL 29 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

DERREK PANNELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

DERREK PANNELL
Pro Se Petitioner
#74386053/Bldg. 5812
P.O. Box 2000
F.C.I. Fort Dix
Fort Dix, NJ 08640

QUESTIONS PRESENTED FOR REVIEW

1. Whether a prosecution pursuant to 18 U.S.C. § 2114 is repugnant to the Constitution when such "mail matter, or money, or other property" lacks a jurisdictional nexus to the United States, or where such crime occurred within the territory of the state.

2. Did Congress intend for 18 U.S.C. § 2114 to be exercised outside of the territorial limits of the United States?

PARTIES TO THE PROCEEDINGS

Derrek Pannell
#74386053/Bldg. 5812
P.O. Box 2000
F.C.I. Fort Dix
Fort Dix, NJ 08640

Solicitor General
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 1

STATEMENT OF CASE 2

ARGUMENT FOR REASON TO GRANT WRIT OF CERTIORARI 3

CONCLUSION 14

APPENDIX A UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, SUMMARY ORDER (FILED APR. 7, 2009) ... App. 1

APPENDIX B UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, JUDGMENT IN A CRIMINAL CASE (FILED MAY 8, 2008) ..... App. 8

APPENDIX C LETTER FROM *NATIONAL ARCHIVES AND RECORDS ADMINISTRATION*, DATED MAY 9, 2008 ..... App. 29

APPENDIX D LETTER FROM *UNITED STATES POSTAL SERVICE*, VIA CERTIFIED MAIL, DATED APRIL 7, 2008 ..... App. 31

APPENDIX E CITY REGISTER RECORDING AND ENDORSEMENT PAGE, KINGS COUNTY ..... App. 33

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States, 63 S.Ct. 1122 (1943).....9

Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142 (1985).....11

Bowling v. Slayton, 344 F.Supp. 650 (1972).....5

Collins v. Yosemite Park & Curry Co., 59 S.Ct. 1009 (1938).....8

Fort Leavenworth R. Co. v. Iowa, 5 S.Ct. 995 (1885).....9

Gibbons v. Ogden, 9 Wheat. 1 (1824).....3

Gregory v. Ashcroft, 115 L.Ed.2d 410 (1991).....11

In The Matter of Orlando Jackson, 24 L.Ed. 877 (1877).....12

James v. Dravo Contracting Co., 58 S.Ct. 208 (1937).....8

Jones v. United States, 146 L.Ed.2d 902 (2000).....12

Keller v. United States, 53 L.Ed. 737 (1909).....3

Kinsella v. United States, 80 S.Ct. 297 (1960).....9

Marbury v. Madison, 1 Cranch 137 (1803).....4

Mculloch v. Maryland, 4 Wheat. 316 (1819).....6, 9

People v. Gerald, 40 Misc.2d 819 (1963).....5

People v. Godfrey, 17 Johns 225 (1819).....4

People v. Kobryn, 294 N.Y. 192 (1945).....5

People v. Tate, 128 A.2d 652 (1987).....5

TABLE OF AUTHORITIES – Continued

Page

People v. Williams, 136 Misc.2d 294 (1987).....5

Silas Mason Co. v. Tax Commission, 58 S.Ct. 233 (1937).....8

Surplus Trading Co. v. Cook, 50 S.Ct. 455 (1930).....4

United States v. Beavans, 3 Wheat. 336 (1818).....4, 7

United States v. Dewitt, 9 Wall. 41 (1870).....3

United States v. Garcia, 82 L.Ed.2d 472 (1984).....6, 7

United States v. Johnson, 994 F.2d 980 (2nd Cir. 1993).....8

United States v. Lopez, 131 L.Ed.2d 626 (1995).....3

United States v. Reid, 517 F.2d 953 (1975).....6

United States v. Rivera, 513 F.2d 519 (1975).....6

STATUTES, CONSTITUTION

18 U.S.C. § 5.....11

18 U.S.C. § 2114.....*passim*

28 U.S.C. § 1254(1).....1

40 U.S.C. § 255.....8

40 U.S.C. § 3112.....5, 8, 11

U.S. Constitution Art. I, Sec. 8, Cl. 7.....1, 9

U.S. Constitution Art. I, Sec. 8, Cl. 17.....*passim*

U.S. Constitution Art. I, Sec. 8, Cl. 18.....2, 9

U.S. Constitution Art. IV, Sec. 3, Cl. 2.....2, 13

TABLE OF AUTHORITIES – Continued

Page

U.S. Constitution Amend. IX 2, 7

U.S. Constitution Amend. X.....2, 7

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit (Straub, Pooler, and Raggi) is unpublished and is included in the Appendix.

BASIS OF JURISDICTION

The supreme court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to consider granting a petition for Writ of Certiorari from a judgment on an appeal from the United States Court of Appeals for the Second Circuit entered on April 7, 2009, denying petitioners appeal. A petition for rehearing was timely filed, which subsequently was denied on May 5, 2009 (App. 2).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, Sec. 8, Cl. 7

> To Establish Post Offices and Post Roads. . . .

U.S. Const., Art. I, Sec. 8, Cl. 17

> To exercise exclusive Legislation in all cases whatsoever . . . Like Authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.

U.S. Const., Art. I, Sec. 8, Cl. 18

> To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, . . . or in any Department or Officer thereof.

U.S. Const., Art. IV, Sec. 3, Cl. 2

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States. . . .

U.S. Const., Amend. IX

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. Const., Amend. X

> The powers not delegated . . . are reserved to the States respectively, or to the people.

STATEMENT OF CASE

On November 15, 2005, the James E. Davis Post Office, located at 315 Empire Boulevard, in Brooklyn, New York was robbed at gunpoint, at approximately 5:45 am by three masked man. On July 26, 2006, pursuant to an arrest and search warrant based on belief of a conspiracy, petitioner was arrested by the United

States Postal Service. On August 24, 2006, the petitioner was indicted. Superseding indictments were filed on November 9, 2006 and March 29, 2007, and trial commenced on September 17, 2007. Petitioner was convicted of all three counts and sentenced to a total of twenty-five years imprisonment.

ARGUMENT FOR REASON TO GRANT WRIT OF CERTIORARI

The Second Circuit Court of Appeals found that because Congress enacted 18 U.S.C. § 2114 and prohibited the robbery "of anyone who is a custodian of 'any money or other property' of the United States" that jurisdiction conveys upon the federal courts to prosecute for the robbery of a post office and such prosecution would not infringe on the Tenth Amendment, even though said post office failed to obtain jurisdiction over the locus in quo nor does the United States own the building [Exhibit A]. The court's ruling abandoned the doctrine of stare decisis. It is axiomatic that the federal government does not have a general police power, ***GIBBONS v. OGDEN,*** 9 Wheat. 1 (1824); ***KELLER v. UNITED STATES,*** 53 L.Ed. 737 (1909); ***UNITED STATES v. DEWITT,*** 9 Wall. 41 (1870); ***UNITED STATES v. LOPEZ,*** 131 L.Ed.2d 626 (1995); and the jurisdiction of the courts of the United States must be derived under the eighth section of the first article and seventeenth paragraph of the Constitution of the United States, which gives to Congress "exclusive legislation over all

places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings," see, ***PEOPLE v. GODFREY,*** 17 Johns 225 (1819). The power of exclusive legislation which is jurisdiction says Chief Justice Marshall in ***UNITED STATES v. BEAVANS,*** 3 Wheat. 336, 338 (1818), also ***SURPLUS TRADING CO. v. COOK,*** 50 S.Ct. 455 (1930) (exclusive legislation is synonymous with exclusive jurisdiction), is united with cession of territory, which is to be the free act of the states. It is incontestable that Congress must conform to the Constitution and not the Constitution conform to Congress, so their intentions when enacting 18 U.S.C. § 2114 could not have been to usurp the historic police powers of the states or to federalize the law of robbery, for such acts whether it be the former or the latter would be treason on the Constitution(s). There is no doubt that Congress is well within their constitutional capacity to create criminal legislation when pertaining to post offices and government property and the constitutionality of § 2114 is [NOT] being challenged, however, the exercise of such legislation is specifically defined in the Constitution, Art. I, Sec. 8, Cl. 17. So naturally Congress cannot convey to the federal courts more jurisdiction than is permitted by the Constitution. ***MARBURY v. MADISON,*** 1 Cranch. 137, 2 L.Ed. 60 (1819). The Constitution mandates that Congress cannot give itself plenary police powers, so if the unambiguous language of the Constitution is wide enough to authorize the purchase of land for a post office and the

acceptance of a grant of jurisdiction, there is no reason for taking the language of the statute in any narrower sense, we simply must embrace the Constitution. The state has recognized that the mere fact a building is clothed with a U.S. title does not oust the state jurisdiction over illicit offenses in said building, see ***PEOPLE OF THE STATE OF NEW YORK v. KOBRYN,*** 294 N.Y. 192 (1945), ***PEOPLE v. GERALD,*** 40 Misc.2d 819 (1963), ***PEOPLE v. TATE,*** 128 A.2d 652 (1987), ***PEOPLE v. WILLIAMS,*** 136 Misc.2d 294 (1987). In ***BOWLING v. SLAYTON,*** 344 F.Supp. 650 (1972), the court found that the states had jurisdiction to prosecute for burglary of a post office in a "building owned privately and leased to the United States," which is indistinguishable in the matter before this court. Since the U.S. Post Office at 315 Empire Blvd., Brooklyn, NY is the locus delicti and said post office has not acquired consent from the state for the right to process any civil or criminal matters on said property as required by the Constitution Art. I, Sec. 8, Cl. 17 which is tantamount to Congress's enactment of 40 U.S.C. § 3112, federal courts are without jurisdiction to entertain a prosecution pursuant to § 2114. For the taking of property belonging to such building, police powers remain exclusively in the state; to this purpose, federal and state governments are independent sovereigntics, have distinct and separate jurisdictions, and move in entirely different spheres. The principal is clear that a sovereign putting his property within the territory and jurisdiction of another sovereign, and without question under his

protection, submits it to the laws of the state. Police power extends over all subjects within the territorial limits of the states, and has never been ceded to the U.S. The court in ***MCULLOCH v. MARYLAND,*** 4 Wheat. 316, 352, stated: "The U.S. cannot, either by a direct law or by a contract with a third party take away any right from the states not granted by the Constitution; they cannot do collaterally and by implication what cannot be done directly." Therefore, since the state has not relinquished its jurisdiction over the building at 315 Empire Blvd. they cannot be deprived of it by a contract between other parties. Under such dogma the U.S., at its own discretion, may contract away every right of every state.

Under the policy of the Second Circuit, it was determined that § 2114 requires a postal nexus, ***UNITED STATES v. REID,*** 517 F.2d 953 (1975), ***UNITED STATES v. RIVERA,*** 513 F.2d 519 (1975), the United States Supreme Court corrected such policy in ***UNITED STATES v. GARCIA,*** 82 L.Ed.2d 472 (1984), and determined based on the statutory language of § 2114, it is not required to have a postal nexus. Pre-***GARCIA,*** it may have been plausible to infer that Congress was acting under Clause 7 of Article I, Section 8, when establishing § 2114. Post-***GARCIA,*** such plausibility would be illogical, for it would be an expansion of an enumeration to establish post offices and post roads, then exert such given right and apply it to any and every government agency. Therefore, in order for Congress to have a proper jurisdictional basis for § 2114, they had to be

in conformity with Art. I, Sec. 8, Cl. 17. Although Congress was Constitutionally proper in the creation of § 2114, the statute is meant to be exercised where such "mail matter, or money, or other property" lies within the territory of the federal government, or else a federal robbery statute being prosecuted in federal courts while such robbery is within the sovereignty of a state would infringe on the Ninth and Tenth Amendments coupled with a repugnance to Art. I, Sec. 8, Cl. 17, making it contrary to the iron clasp principals set forth in the U.S. Constitution. To hold otherwise would destroy the purpose, intent and very meaning of the entire Constitution. In ***GARCIA,*** supra, Justice Stevens, Brennan, and Justice Marshall dissented stating:

> Law enforcement remains and should remain the primary responsibility of the several states. Every increase in the power of the federal prosecutor moves us a step closer to a national police force with its attendant threats to individual liberty. For that reason, I believe we have a special obligation to make sure that Congress intended to authorize a novel assertion of federal criminal jurisdiction.

So do federal or state courts have jurisdiction for the taking of property belonging to a building being used for a federal purpose? ***UNITED STATES v. BEAVANS,*** 3 Wheat. 336 (1818), Chief Justice Marshall observed that, to bring the offense within the jurisdiction of the courts of the union, it must have been committed out of the jurisdiction of any state. It is not

(he says) the offense committed, but the place in which it is committed, which must be out of the jurisdiction of the state. In ***UNITED STATES v. JOHNSON,*** 994 F.2d 980 (2nd Cir. 1993), the court found due to the fact there was an acceptance of jurisdiction as required by 40 U.S.C. § 3112, formerly 40 U.S.C. § 255, the court had subject matter jurisdiction. They also noted that:

> During the 1930's, the Supreme Court decided a series of cases involving whether general state cessions of jurisdiction were valid without federal government acceptance of that jurisdiction. See, ***COLLINS v. YOSEMITE PARK & CURRY CO.,*** 58 S.Ct. 1009, 1013-1014 (1938), ***JAMES v. DRAVO CONTRACTING CO.,*** 58 S.Ct. 208, 215 (1937), ***SILAS MASON CO. v. TAX COMMISSION,*** 58 S.Ct. 233, 243-244 (1937). Each case involved litigants seeking to avoid application of state law, arguing that general automatic state ceding statutes which ceded jurisdiction upon the mere acquisition of property by the federal government – precluded enforcement of state laws. In all three cases, the Supreme Court noted that the U.S. could not be forced to accept unwanted legislative jurisdiction, and held that the general ceding statutes were insufficient in themselves to transfer legislative authority.

Therefore, unless and until the U.S. has accepted jurisdiction in a manner prescribed by Congress 40 U.S.C. § 3112, also as our framers have set forth in

Art. I, Sec. 8, Cl. 17, federal courts are without exclusive legislative authority in the instant matter and is simply that of an ordinary proprietor subject to state law, see, ***ADAMS v. UNITED STATES,*** 63 S.Ct. 1122 (1943), ***FORT LEAVENWORTH R. CO. v. IOWA,*** 5 S.Ct. 995 (1885).

Does the coupling of Art. I, Sec. 8, Cl. 7 and Cl. 18 of the U.S. Const. give federal courts jurisdiction adjudicative authority, as the second circuit determined? Cl. 18 is itself not a grant of power but a caveat that Congress possesses all the means necessary to carry out the powers specifically granted, ***KINSELLA v. UNITED STATES,*** 80 S.Ct. 297. The power granted in the matter is executed by the single act of establishing a post office and post road, although it has been inferred from such power the right to punish those who rob the post office, it is irrefutable that the power of punishment appertains to sovereignty, ***MCULLOCH,*** supra, at 418. Since the post office was within the sovereign of the state, the right to seek punishment belongs to the state, neither § 2114, Cl. 7 nor Cl. 18 provides federal courts with automatic judicatory authority. For the erection of such post and to exercise exclusive legislation, the U.S. would need consent from the state, see Art. I, Sec. 8, Cl. 17. Congress's exclusive authority when annexed to Cl. 7 is to make all needful rules and regulations for its daily operations, i.e., price of stamps, prohibiting mailable items, etc. It is in this sphere states are barred from intruding upon.

The government's contention that "mail matter, or any money, or other property of the United States" confers jurisdiction pursuant to § 2114 and not the building where the crime occurs, Gov. Supp. Br. at 16, would be legitimate if such "mail matter, money, or other property" had a jurisdictional nexus to the United States. If we look at where the property belong we find that it belongs to an ordinary proprietor within the jurisdiction of the state; if we look at where the crime occurred, we find it too is within the jurisdiction of the state. The fact that such 'property' is camouflaged with a U.S. title does not oust the state jurisdiction of judicial proceedings, nor does it provide federal courts with it. The statute cannot be used to overstep the boundaries that have been set forth by our framers, and I believe we have been on the path of "enumerated presupposes, not enumerated" for one year too many.

No constitutional argument is or could be raised that Congress is without power to criminalize robbery outside of the government's territorial jurisdiction, the question is did Congress intend to do so with 18 U.S.C. § 2114? It is clear that § 2114 is exercising a police power which the federal government can only exert in its territorial jurisdiction or pursuant to an enumerated power, so if Congress wanted any statute to be used outside of its territorial jurisdiction such as anywhere or anyplace, they would have included the interstate commerce clause nexus. A plain reading of the statute shows no language that § 2114 is to be applied extraterritorial. To alter the constitutional

balance between the states and the federal government, Congress must make such intentions unmistakably clear in the language of the statute, ***ATASCADERO STATE HOSPITAL v. SCANLON,*** 105 S.Ct. 3142 (1985), ***GREGORY v. ASHCROFT,*** 115 L.Ed.2d 410 (1991). It is perspicuous that the United States wanted to protect its "money" and "property" under their own laws, knowing while such money and property lies within the territory of the state it is subject to the laws of the state pertaining to criminal action. The enactment of § 2114 is not an automatic cession of jurisdiction to federal courts over government money or other property. The United States has a choice whether or not to protect its property by state or federal laws, the latter is executed by filing the proper prerequisites with the state as required de jure, 40 U.S.C. § 3112, U.S. Const. Art. I, Sec. 8, Cl. 17. Furthermore, the term United States as used in § 2114 is defined in 18 U.S.C. § 5 which states: "'United States', as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." Therefore, any "mail matter, or money, or other property of the United States" was purported to apply solely to the territory of the federal government and Congress could not have intended for § 2114 to apply outside of the jurisdiction of the United States, to conclude otherwise would turn a congressional authority into a police power.

Robbery of the post office at 315 Empire Blvd. is not an effect on a nationwide basis, to bestow federal jurisdiction, nor does such robbery violate the power vested in Congress to establish post offices and post roads since such power is the regulation of the entire postal system of the country, and under it Congress may designate what may be carried in the mail and excluded, not policing crime within a state that is regarded as mala in se, ***IN THE MATTER OF ORLANDO JACKSON,*** 24 L.Ed. 877, 878 (1877) (If the people conferred upon Congress authority to regulate public morals, the statute before us would not be open to judicial criticism; but the people never conferred and Congress cannot exercise any such right except where the general government has territorial jurisdiction. U.S. Const. Art. I, Sec. 8, Sub. 17). Although laws change and contracts may exist, the fundamentals of sovereignty remain, and no law or contract is meant to oust one of its sovereignty nor could it. To determine that Congress intended for § 2114 to apply within the territory of the state would be injurious to state sovereignty, and a robbery of such type should be prosecuted in the court of the several states and not the court of the union. Legislation of the U.S. does not assume to restrict the authority, which the states have always exercised, or punishing in their own tribunals the crime of robbery executed by private persons on private land, ***JONES v. UNITED STATES,*** 146 L.Ed.2d 902 (2000) (" . . . we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain").

There are two provisions in the Constitution under which Congress may create jurisdiction for the federal government to prosecute crimes on federal property: the property clause Art. IV, § 3, Cl. 2 and the federal enclave clause Art. I, § 8, Cl. 17. The property clause is inept simply because the United States does not possess a deed to the property in question, and it has been proven by records that the enclave clause has failed to be executed by the United States. Therefore, under the Constitutional provisions provided, I reiterate my averment that Congress's only intention for 18 U.S.C. § 2114 was meant to apply to the territory of the federal government.

Due to the fact that the decision by the Second Circuit conflicts with the United States Constitution Art. I, § 8, Cl. 17, and the exercise of 18 U.S.C. § 2114 outside of the territory of the United States is an important question to the United States which has not been raised in this court, I humbly pray this Writ of Certiorari is granted.

CONCLUSION

That the conviction and sentence be vacated for the reasons set forth, the indictment dismissed subject to state prosecution, or whatever means this Court finds to be just and proper.

Originally Filed: July 30, 2009

Resubmitted on: October 5, 2009

Respectfully submitted,

DERREK PANNELL
Pro Se Petitioner
#74386053/Bldg. 5812
P.O. Box 2000
F.C.I. Fort Dix
Fort Dix, NJ 08640

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Apr. 7, 2009)

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE

DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of April, two thousand and nine.

Present: HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER,
HON. REENA RAGGI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-v- 08-2386-cr

DERREK PANNELL,

Defendant-Appellant.

For Appellant: Paul P. Rinaldo, Grossman & Rinaldo, Forest Hills, New York

For Appellee: Emily Berger, John J. Durham, Assistant United States Attorneys, *for* Benton J. Campbell, United States Attorney, Eastern District of New York, Brooklyn, New York.

ISSUED AS MANDATE: MAY 5 2009

Appeal from the United States District Court for the Eastern District of New York (Gershon, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED.**

Derrek Pannell appeals from a judgment of the United States District Court for the Eastern District of New York (Gershon, *J.*), entered on May 8, 2008, convicting him, after a jury trial, of conspiracy to rob a United States Post Office, the armed robbery of a United States Post Office, and brandishing a firearm, a semi-automatic handgun, in furtherance of that robbery, in violation of 18 U.S.C. §§ 371, 2114(a), and 924(c)(1)(A)(ii), respectively. We assume the parties' familiarity with the facts, procedural background, and specification of issues on appeal.[1]

Pannell first contends that the district court improperly exercised subject matter jurisdiction over the underlying criminal conduct – the robbery of a United States Post Office – because the United States does not own the land or property on which the post office is located and failed to obtain "exclusive jurisdiction" over that land and property. This argument fails because by enacting 18 U.S.C. § 2114 Congress prohibited the robbery "of anyone who is a custodian of 'any money or other property of the United States." *Garcia v. United States,* 469 U.S. 70,

---

[1] Pannell supplemented his attorney's brief with a pro se brief making several additional arguments. We address the issues raised in both briefs in this order.

80 (1984). Federal jurisdiction is properly predicated on the fact that "the stolen property in fact belonged to the [federal] Government." *United States v. Jermendy,* 544 F.2d 640, 641 (2d Cir. 1976) (per curiam) (discussing jurisdictional basis for prosecution of theft in violation of 18 U.S.C. § 641); *United States v. LaPorta,* 46 F.3d 152, 158 (2d Cir. 1994) (explaining that in prosecution under 18 U.S.C. § 1361 "[g]overnment title to the property is merely a 'jurisdictional fact' "). That the land on which Pannell committed these crimes was not within the "exclusive jurisdiction" of the federal government does not destroy federal jurisdiction or violate the Tenth Amendment. *See United States v. Smith,* 987 F.2d 888, 893 (2d Cir. 1993) (The "argument that the court lacked jurisdiction over the bank robbery charges because 18 U.S.C. § 2113 violates the Tenth Amendment is also without merit."). Further, to the extent that Pannell otherwise challenges Congress's authority to enact 18 U.S.C. § 2114, that argument fails because in enacting that statute Congress simply exercised the long recognized authority conferred upon it by the Constitution "[t]o establish Post Offices and [P]ost Roads," U.S. Const. art. I, § 8, cl.7, and "[t]o make all Laws which shall be necessary and proper," U.S. Const. art. I, § 8, cl.18, for executing this task, including the prohibition of offenses against post offices. *See M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 417 (1819); *U.S. Postal Serv. v. Brennan,* 574 F.2d 712, 714 (2d Cir. 1978); *see also United States v. Lipscomb,* 299 F.3d 303, 324 (5th Cir. 2002) ("Congress's postal power carrie[s] with it the ability

to impose criminal penalties to protect federal interests advanced by that power."); *United States v. Dittrich,* 100 F.3d 84, 87 (8th Cir. 1996) ("A law making it a crime to steal property from a Post Office is well within even the narrowest construction of the Necessary and Proper Clause.").

Pannell next argues that the district court improperly denied his motion to suppress the evidence recovered from his house pursuant to a search warrant. We see no reason to disturb the court's findings of probable cause, but in any event, evidence seized pursuant to a warrant is admissible even if the warrant lacks probable cause as long as the executing officers relied upon the warrant in "objective good faith." *See United States v. Leon,* 468 U.S. 897, 920 (1984); *United States v. Moore,* 968 F.2d 216, 222 (2d Cir. 1992). Pannell has not demonstrated that a "'reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization,'" *Moore,* 968 F.2d at 222 (quoting *Leon,* 468 U.S. at 922 n.23), and accordingly, we find no error in the district court's ruling.

Pannell's third argument – that witness identification testimony was improperly admitted during his trial – also fails because, by not raising this issue before the district court, Pannell waived it. *See United States v. Salameh,* 152 F.3d 88, 125-26 (2d Cir. 1998); Fed. R. Crim. P. 12(b)(3).

Next, Pannell asserts that the district court erred in denying his motion for a mistrial based upon a

violation of his Fifth Amendment right to remain silent. We agree that "[i]t is generally impermissible for the prosecution to comment on the accused's invocation of his right to remain silent in an effort to impeach the accused's exculpatory testimony at trial." *United States v. Matthews,* 20 F.3d 538, 551-552 (2d Cir. 1994). However, where, as here, the district court sustains objections to this line of questioning, delivers a curative instruction, and instructs the jury to disregard questions and answers to which an objection has been sustained, there is no constitutional violation. *See Greer v. Miller,* 483 U.S. 756, 763-65 (1987). Nor do we think the prosecutor's *attempt* to violate the Constitution was so egregious as to deny Pannell due process. *See id.* at 765-66. In light of the strong evidence of Pannell's guilt produced at trial and the context of the asserted violation, we find harmless whatever error there was. *See Brecht v. Abrahamson,* 507 U.S. 619, 629 (1993); *Matthews,* 20 F.3d at 552; *United States v. Casamento,* 887 F.2d 1141, 1179-80 (2d Cir. 1989).

Finally, Pannell complains of two sentencing enhancements – a two level enhancement under U.S.S.G. § 3C1.1 for committing perjury and thus obstructing justice, and a four-level enhancement under U.S.S.G. § 3B1.1(a) for playing a leadership role. We discern no error in the district court's finding that Pannell wilfully and materially committed perjury during his trial testimony. *See United States v. Worjloh,* 546 F.3d 104, 111 (2d Cir. 2008) (per curiam) (permitting obstruction of justice enhancement based

on defendant's trial testimony). Nor do we find error in the court's imposition of the leadership enhancement, since there was ample evidence to support the conclusion that Pannell acted as an organizer or leader and that the robbery conspiracy involved five or more participants or was otherwise extensive. *United States v. Rubenstein,* 403 F.3d 93, 99 (2d Cir. 2005); *United States v. Si Lu Tian,* 339 F.3d 143, 156 (2d Cir. 2003) ("A 'participant' for the purposes of an offense-role enhancement is someone 'who is criminally responsible for the commission of the offense,' but that person 'need not have been convicted.'" (quoting U.S.S.G. § 3B1.1, cmt. n. 1)).

We therefore affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by /s/ [Illegible]
DEPUTY CLERK

APPENDIX B

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(Filed May 8, 2008)
Derrek Pannell	Case Number: CR 06-578 (NG)
	USM Number: 74386-053
	Paul Rinaldo, Esq. Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) one, two, and three after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC§ 371	Conspiracy to Assault and Rob Employees of the United States Postal Service By Use of a Dangerous Weapon, a Class D Felony	11/15/2005	1
18 USC§ 2114	Robbery of Money, Mail or Other Property of the United	11/15/2005	2

	States, a Class B Felony		
18 USC§ 924 (c)(1)(A)(ii)	Unlawful Use of a Firearm, a Class A Felony	11/15/2005	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) The underlining indictment X is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 24, 2008
Date of Imposition of Judgment

/s/ NG
Signature of Judge

Nina Gershon, USDJ
Name and Title of Judge

May 7, 2008
Date

DEFENDANT: Derrek Pannell

CASE NUMBER: CR 06-578(NG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

**Five (5) years on count 1.
Eighteen (18) years on count 2, to run concurrently with count 1. Mandatory seven (7) years on count 3, to run consecutively to counts 1 and 2.**

X The court makes the following recommendations to the Bureau of Prisons:

Designate the defendant to the northeast region.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ a _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three (3) years on count 1.
Five (5) years on counts 2 and 3, to run concurrent to each other and to count 1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two

periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide full financial disclosure to the U.S. Probation Department.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ -0-	$ 65,776.00 joint and several with Darren Rucker

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk of Court-EDNY *o/b/o* ***Postal Inspector in Charge*** *New York Division PO Box 555 New York, NY 10116*	65,776.00	65,776.00	25% of net monthly income
TOTALS	$ 65776.00	$ 65776.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A *X* Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g.,

30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Derrek Pannell and Darren Rucker
06-cr-578(02), $65,776.00

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

(Filed May 8, 2008)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The court adopts the presentence investigation report without change.**

B *X* **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use page 4 if necessary.)

1 *X* **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

The court did not find abuse of a position of trust.

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by court (including

changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II **COURT FINDING ON MANDATORY MINIMUM SENTENCE** (Check all that apply.)

A ☐ No count of conviction carries a mandatory minimum sentence.

B *X* Mandatory minimum sentence imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C. § 3553(e))

☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 36 on counts 1 and 2

Criminal History Category: I

Imprisonment Range: 188 to 235 months, and a minimum of seven (7) years consecutive for count 3

Supervised Release Range: 0 to 5 years

Fine Range: $ _____ to $ _____

X Fine waived or below the guideline range because of the priority of restitution.

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B *X* **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use page 4 if necessary.)

Sufficient for punishment and deterrence.

C ☐ **The court departs from the advisory guideline range for reasons authorized**

by the sentencing guidelines manual. (Also complete Section V.)

D ☐ **The court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one.):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ 5K1.1 plea agreement based on the defendant's substantial assistance

☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program

☐ binding plea agreement for departure accepted by the court

☐ plea agreement for departure, which the court finds to be reasonable

☐ plea agreement that states that the government will not impose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ 5K1.1 government motion based on the defendant's substantial assistance.

☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program

☐ government motion for departure

☐ defense motion for departure to which the government did not object

☐ defense motion for departure to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.)

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.):

☐ 4A1.3 Criminal History Inadequacy

☐ 5H1.1 Age

☐ 5H1.2 Education and Vocational Skills

☐ 5H1.3 Mental and Emotional Condition

☐ 5H1.4 Physical Condition

☐ 5H1.5 Employment Record

☐ 5H1.6 Family Ties and Responsibilities

☐ 5H1.11 Military Record, Charitable Service, Good Works

☐ 5K2.0 Aggravating or Mitigating Circumstances

☐ 5K2.1 Death

☐ 5K2.2 Physical Injury

- ☐ 5K2.3 Extreme Psychological Injury
- ☐ 5K2.4 Abduction or Unlawful Restraint
- ☐ 5K2.5 Property Damage or Loss
- ☐ 5K2.6 Weapon or Dangerous Weapon
- ☐ 5K2.7 Disruption of Government Function
- ☐ 5K2.8 Extreme Conduct
- ☐ 5K2.9 Criminal Purpose
- ☐ 5K2.10 Victim's Conduct
- ☐ 5K2.11 Lesser Harm
- ☐ 5K2.12 Coercion and Duress
- ☐ 5K2.13 Diminished Capacity
- ☐ 5K2.14 Public Welfare
- ☐ 5K2.16 Voluntary Disclosure of Offense
- ☐ 5K2.17 High-Capacity, Semiautomic Weapon
- ☐ 5K2.18 Violent Street Gang
- ☐ 5K2.20 Aberrant Behavior
- ☐ 5K2.21 Dismissed and Uncharged Conduct
- ☐ 5K2.22 Age or Health of Sex Offenders
- ☐ 5K2.23 Discharged Terms of Imprisonment
- ☐ Other guideline basis (*e.g.*, 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (Check all that apply.)

A **The sentence imposed is** (Check only one.):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court

☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable

☐ plea agreement that states that the government will not impose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))

☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use page 4 if necessary.)

VII COURT DETERMINATIONS OF RESTITUTION

A ☐ Restitution Not Applicable.

B Total Amount of Restitution: *$65,776.00*
at a rate of 25% of the defendant's net monthly income, joint and several with Darren Rucker.

C Restitution not ordered (Check only one):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663

and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: [Social Security Number Omitted]	Date of Imposition of Judgment April 24, 2008
FBI#: [Financial Account Number Omitted]	
PACTS#: [Financial Account Number Omitted]	
Defendant's Date of Birth: [Date Of Birth Omitted]	/s/ Nina Gershon Signature of Judge
Defendant's Residence Address: [Home Address Omitted]	Nina Gershon, USDJ Name and Title of Judge
Defendant's Mailing Address:	Date Signed April 28, 2008

APPENDIX C

[LOGO] *National Archives and Records Administration*

8601 Adelphi Road
College Park, Maryland 20740-6001

May 9, 2008

Derek Pannell
74386-053
P.O. Box 329002
Brooklyn, NY 11232

Dear Mr. Pannell:

This is in response to your February 13, 2008, Freedom of Information Act request (NW-29847) for information relating to the United States Post Office located at 315 Empire Boulevard, Brooklyn, NY, 11225. We received your request on March 19, 2008.

A search of Record Group (RG) 121, Records of the Public Buildings Service, was able to find files for the Post Office in question in a series of records entitled: Title Papers and Site Regitsers: Title Papers, 1838-1971, Nowhere in the files could we find a copy of or reference to any documents requesting the cession of state jurisdiction to the Federal Government. It is possible that such a document may be on file with the state legislature or in the New York State Archives. You can write to them at: New York State Archives, New York State Education Department, Cultural Education Center, Albany, NY 12230.

We do not consider this response a denial under the Freedom of Information Act because the records in

our custody do not include the information you requested. If you consider this an adverse response, you may appeal by writing to the Deputy Archivist (NW), National Archives at College Park, 8601 Adelphi Road, College Park, Maryland, 20740-6001, and explain why you think our search does not meet the requirements of the FOIA.

We regret that we could not be of more assistance to you. If there are any further questions, the staff of the Archives II Reference Section would be pleased to help. We may be contacted by writing to the Archives II Reference Section (NWCT2R), The National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740-6001.

Sincerely,

/s/ [Illegible]
GENE MORRIS
Archives II Reference Section (NWCT2R)
Textual Archives Services Division

APPENDIX D

NEW YORK FACILITIES SERVICE OFFICE

[LOGO] *UNITED STATES POSTAL SERVICE*

April 7, 2008

Via Certified Mail – 7007 1490 0001 2791 4165

Derrek Pannell
74386053
P.O. Box 329002
Brooklyn, NY 11232

RE: FOIA Request dated March 24, 2008

Dear Mr. Pannell::

This responds to your Freedom of Information Act (FOIA) request dated March 24, 2008, in which you sought information relating to whether the Postal Service has claimed federal jurisdiction of the property located at 315 Empire Blvd., Brooklyn, NY 11225, pursuant to 40 U.S.C. 3112.

Your request has been referred to my attention due to the nature of the information requested. I regret to inform you that there are no records currently maintained by this office that would contain responsive information. For your information, the Postal Service does not own the referenced property, but rather the Postal Service leases the premises from a private entity. Under such circumstances, the Postal Service would not seek to obtain exclusive federal jurisdiction of the premises.

Therefore, I am unable to provide you with any further information in response to your request. I do not consider this a denial of your request in that no records are being withheld. However, should you disagree, you have the right to appeal this response by writing to the Chief Counsel, Customer Protection and Privacy, United States Postal Service, 475 L'Enfant Plaza SW, Room 6138, Washington, DC 20260, within 30 days of the date of this letter. The letter of appeal should include a statement about the action or failure to act being appealed, the reasons why it is believed to be erroneous, and the relief sought, along with copies of your original request, this letter, and any other related correspondence.

Thank you for your continued interest in the Postal Service.

Sincerely,

/s/ Roger Gilligan

Roger Gilligan
Manager, Facilities Contracts & Administration

TWO HUDSON PLACE, FIFTH FLOOR
HOBOKEN, NJ 07030-5502
(201) 714-5465
FAX: (201) 217-1109

APPENDIX E

CITY REGISTER RECORDING AND ENDORSEMENT PAGE

COUNTY OF ►Kings
THIS PAGE FORMS PART OF THE INSTRUMENT

TOTAL NUMBER OF PAGES IN DOCUMENT INCLUDING THIS PAGE ►3

Block ▼	**Lots – ONLY IF ENTIRE LOT ▼**	**Partial Lots ▼**
1308	47	**P/O**

Premises ▼
[Home Address Omitted]

Tile/Agent Company Name ▼

Title Company Number ▼

[ILLEGIBLE] RETURN TO:

NAME ▼
[Home Address Omitted]

ADDRESS ▼

CITY ▼ STATE ▼ ZIP ▼

NAME & ADDRESSES

PARTY 1► Aaron Silberstein [Home Address Omitted]
ADDITIONAL
PARTY 1► Malka Silberstein [Home Address Omitted]
PARTY 2► Bela Kalman & Lazara Kalman as trustees of the
ADDITIONAL
PARTY 2► Hewes Irrevocable Trust [Home Address Omitted]

CHECK THIS BOX IF THERE ARE MORE THAN 2 OF EITHER PARTY ..... ☐

[ILLEGIBLE] USE ONLY DO NOT WRITE BELOW THIS LINE

Examined by (✓): [Illegible]

Mtge Tax Serial No.

Mtge Amount $

Taxable Amount $

Examined (✓): YES ☐ NO ☐

Type: [[Illegible]] [[Illegible]] [OTHER] [Illegible]

Dwelling Type: [1 to 2] [3] [4 to 5] [OVER 6] [Illegible]

TAX RECEIVED ON ABOVE MORTGAGE ▼

County ([Illegible]) $

City (Add'l) $

Spec Add'l $

TASF $

MTA $

NYCTA $

TOTAL TAX $

Apportionment Mortgage (✓) YES ☐ NO ☐

City Register Serial Number ► 040244

Informed By (✓): [Illegible]

Verified By (✓): [Illegible]

Block(s) and Lot(s) verified by (✓):

Address JK ☐ Tax Map ☐

Entire Block(s) _____ **Lot(s)** _____

Recording Fee ✓ $ 32

Affidavit Fee (C) $ 32

RPTT Fee (R) $ 25

HPD-A ☑ **HPD-C** ☐

New York State Real Estate Transfer Tax ▼
$ 0

Serial Number ► 019337

New York City Real Property Transfer Tax Serial Number ► 09379

RECORDED IN THE OFFICE OF THE CITY REGISTER OF THE CITY OF NEW YORK

[SEAL] 2001 May 7 A 9:37
/s/ John [Illegible]

[Illegible] S.V.R.T.R. Form [Illegible] – Warranty Deed, with Full Comments – [Illegible]

CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT – THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY.

THIS INDENTURE, made the 2 of April, Two Thousand
BETWEEN

Aaron Silberstein and Malka Silberstein, his wife, as tenants by the entirety, both residing at [Home Address Omitted] SELLER

party of the first part, and

Bela Kalman and Lazara Kalman as trustees of the Hewes Irrevocable Trust with an address at [Home Address Omitted] BUYER

party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten Dollars and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, sit rate, lying and being in the **Borough of Brooklyn, County of Kings City and State of New York, bounded and described as follows:**

BEGINNING at the point on the northerly side of Empire Boulevard (formerly Malbone Street), distant 481 feet 5 inches easterly from the corner formed by the intersection of the northerly side of Empire Boulevard with the easterly side of Rogers Avenue;

THENCE northerly at right angles to Empire Boulevard, 100 feet;

THENCE easterly parallel with Empire Boulevard, 120 feet;

THENCE southerly at right angles to Empire Boulevard, 100 feet to the northerly side of Empire Boulevard;

THENCE westerly along the northerly side of Empire Boulevard, 120 feet to the point or place of BEGINNING.

Being in the same premises conveyed to grantor herein by deed dated November 22, 1995 and recorded in the County of Kings in Reel 3620 page 2001.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises; **TO HAVE AND TO HOLD** the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

AND the party of the first part covenants as follows: that said party of the first part is seized of the said premises in fee simple, and has good right to convey the same; that the party of the second part shall quietly enjoy the said premises; that the said

premises are free from encumbrances, except as aforesaid; that the party of the first part will execute or procure any further necessary assurance of the title to said premises; and that said party of the first part will forever warrant the title to said premises.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and [Illegible] first above written.

/s/ Aaron Silberstein
Aaron Silberstein

/s/ Malka Silberstein
Malka Silberstein

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

On the [illegible] day of April in the year 2000, before me, the undersigned, a notary public in and for said state, personally appeared Aaron Silberstein and Malka Silberstein, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) acted, executed the instrument.

/s/ Gershon H. Fluk
Notary Public

GERSHON H. FLUK
NOTARY PUBLIC,
State of New York
No. 02FL5042554
Qualified in Kings County
Commission Expires
April 24, 2001

WARRANTY DEED
WITH FULL COVENANTS

TITLE NO.

Aaron Silberstein and
Malka Silberstein

TO

Hewes Irrevocable Trust

SECTION

BLOCK 1308

LOT 47

COUNTY OR TOWN Kings

PREMISES:
311-325 Empire Boulevard

RETURN BY MAIL TO:

N.C. Caller, P.C.
1481 42nd Street
Brooklyn, NY 11219

No. 09-424

Supreme Court, U.S.
FILED
DEC - 2 2009
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DERREK PANNELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Rehearing
of Order Denying
Petition For Certiorari

I, Derrek Pannell, Appellant, presents this petition for a rehearing of this courts order dated November 9, 2009, denying the petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit, and, in support thereof, respectfully shows that this courts intervening supervision is needed for the reasons set forth:

The decision rendered by the Second Circuit Court of Appeals is violative of fundamental principals of a governments general power to exercise authority over all persons and things within its territory, required under both the United States and New York State

Constitutions. Without this courts supervisory control 18 USC § 2114 will continue to be exercised in a manner which congress never intended, resulting in providing the federal government with a valid commission to do business in a state when such consent was not given and a jurisdictional fact is lacking.

It is irrefutable that congress was constitutionally proper enacting 18 USC § 2114, rather, it is federal prosecutors who manipulated the statues true intent and limited applicability. The bill used to enact § 2114 is H.R. Rep. No. 582, 74th Cong. 1st Sess., and the purpose of the bill is to "bring within the provisions of the penal code the crime of robbing or attempting to rob custodians of government moneys". The bill is absent of any language or enumerations given to the federal government in order to usurp the State of New York of its police power, so congress never meant for § 2114 to be applied extraterritorial.

Assuming arguendo that § 2114 was to be applied outside of the territorial jurisdiction of the United States, then under which Constitutional Article or Amendment would uphold a prosecution pursuant to § 2114 when such robbery or 'custodian of any money or other property of the United States', is within the territory of the State of New York?

When the robbery itself, the custodian, money, or other property lacks a nexus to a geographic area where federal judicial authority may be exercised, said crime belongs to the courts of that state in which the crime was committed, U.S. Const. Art. III Sec. 2 Cl. 3.

Federal prosecutors have treated § 2114 as a cession of State authority simply cause chattel is cloaked with a federal or United States title, and if this court fails to act under its supervisory control the continuation of federal prosecutions pursuant to § 2114 outside of the statues true applicable limits would move us closer to a national police force threating the independence of a state, coupling the rivival of 'general federal common law' which this court has prohibited, **ERIE v. TOMPKINS**, 304 us 64 (1938).

The language congress used in § 2114 purports a plain meaning that the statue was not intended to be used outside of the territory of the United States. Congress defined the term United States in 18 USC § 5 on how it is to be used in § 2114 which states;

> "United States, as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the canal zone".

If congress intention were to alter the Constitutional balance between State and Federal governments, 'congress must make such intentions unmistakingly clear in the language of the statue', **ATASCADERO STATE HOSPITAL v. SCANLON**, 105 s.ct 3142 (1985), **GREGORY v. ASHCROFT**, 115 L.ed 2d 410 (1991), and such intent clearly is absent in the langauge of § 2114. The Second Circuit stated, "unless contrary intent appears federal statues apply only within the territorial jurisdiction of the United Sates", **UNITED STATES v. CONTRONI**, 527 F2d 708,711. Therefore, since congress has chosen not to insert any language for § 2114 to be applied extraterritorial

it is non-elective for prosecutors not to use the statue beyond such fact or as they see fit. In the instant matter, petitioner committed no acts that was within the territorial jurisdiction of the United States nor did any custodian or money have a nexus to the territorial jurisdiction of the United States for a U.S. Attorney to seek a prosecution pursuant to § 2114. Learned judges have fallen victim to the repetitive masquerade of prosecutions by U.S. Attorneys. The unconstitutionality of the course pursued by prosecutors is clear and an invasion of the authority of the state and to that extent, a denial of its independence which should compel this court to intervene.

UNITED STATES CONSTITUTION
ART. I SEC. 8 CL. 17

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten Miles square) as may, by cession of particular states and the acceptance of congress become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings;"

In the instant matter, the 'other needful building' which is the locus delicti was not purchased by the consent of the legislature of the state, making State authority the 'exclusive legislation' for any criminal process in said building, and § 2114 cannot be an empowered tool used to inflict punishment where the right to punish is not given.

The United States Constitution does not cede a police power to the federal government, and congress recognized that no jurisd-

iction exists in the United States to enforce federal criminal laws until consent to accept jurisdiction has been filed and accepted as congress provided in 40 USC § 3112. The extraterritorial coverage of § 2114 is not found in the statues text, structure or legislative history and "the acts of congress normally do not have extraterritorial application unless such an intent is clearly manifested", see **SALE v. HAITIAN Ctrs. Council, INC**, 509 us 155, 188 (1993).

The Second Circuits conclusion that Art. I Sec. 8 Cl. 7 (To Establish Post Offices and Post Roads) when attached to Art. I Sec. 8 Cl. 18, provides the federal government with the adjudicative authority to seek punishment is flawed for numerous reasons. First, Cl. 18 is a caveat which is used to create legislation for all of the enumerations ceded in the Constitution and its attachment to Cl. 7 does not provide a police power or extraterritorial jurisdiction. The Second Circuit failed to recognize Cl. 17, which clearly states that such legislation is not to be exercised within a state without the states consent. The power associated with Cl. 7 is defined in Title 39. Second, the post office in question failed to have any conection to the territorial jurisdiction of the United States, making the federal courts subject matter secondary and without adjudicative authority. Third, it seems that the Second Circuit will remain with its decisions in **UNITED STATES v. REID**, 517 F.2d 953 (1975), and **UNITED STATES v. RIVERA**, 513 F.2d 519 (1975), that § 2114 requires a postal nexus although this court has stated

in **GARCIA v. UNITED STATES**, 469 US 70, that "the legislative history shows no intent by congress to limit the statue to postal crimes". The summary order issued by the Second Circuit Court of Appeals stated that congress acting on its authority to enact 18 USC § 2114, "congress simply exercised the long recognized authority conferred upon it by the Constitution to establish Post Offices and Post Roads, U.S. Const. Art. I Sec. 8 Cl. 7..." raises two concerns. First, it is a contradiciton to the decision of **GARCIA**. How can § 2114 not require a postal nexus and apply to all forms of government as stated in **GARCIA**, but be enacted pursuant to a specific enumeration -- to establish Post Offices and Post Roads? Would that not be a expansion of an enumeration? Second, even if § 2114 was enacted pursuant to Cl. 7 the fact remains that, such legislation is not controlling or the substantive law of the offense, U.S. Const. Art. I Sec. 8 Cl. 17. The robbery of a post office pertaining to the details of this crime is a matter of local concern, where such post office failed to have a territorial nexus to the jurisdiction of the United States by provided by congress in 40 USC § 3112, and the enactment of §2114 cannot be a usurpation of State authority.

/S/ D Pannell
Derrek Pannell

Dated: December 2, 2009

CERTIFICATE OF SERVICE

I, Derrek Pannell, Appellant, hereby certify thta I am this day, December 2, 2009, serving true and correct copies of the foregoing **PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI**, via first class mail, with an adequate amount of postage, pursuant to the "prison mailbox rule" enuciated in **HOUSTON v. LACK**, 487 US 266 (1988), as follows:

United States Supreme Court
1 First Street N.E.
Washington DC 20543

United States Department of Justice
Office of the Solicitor General
Washington DC 20530

The foregoing is in compliance with 28 USC § 1746.

Respectfully Submitted,

Derrek Pannell
Reg No. 74386-053
FCI Fort Dix-Bldg 5812
P.O. Box 2000
Fort Dix NJ 08640

Dated: December 2,2009